Office-Supreme Court, U.S.
FILED
DEC 10 1964
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 658

STATE OF SOUTH DAKOTA,

Petitioner,

vs.

THE NATIONAL BANK OF SOUTH DAKOTA, SIOUX FALLS, and FIRST BANK STOCK CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

MELVIN T. WOODS
310 South First Avenue
Sioux Falls, South Dakota 57102

CURTIS L. ROY
2400 First National Bank Building
Minneapolis, Minnesota 55402

Attorneys for Respondents

Of Counsel:

DORSEY, OWEN, MARQUART, WINDHORST & WEST
ROBERT O. FLOTTEN
ROBERT A. JENSEN
2400 First National Bank Building
Minneapolis, Minnesota 55402

1964—Northwest Brief Printing Co., 322 S. Fourth St., Minneapolis, 55415 FE. 8-5078

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Summary of Argument	5
Argument:	
I. The Bank Holding Company Act Issue	6
A. The Phrase "Other Than a Bank" Is a Deliberately Created Exception	7
B. The "Douglas Amendment" Does Not Apply	9
C. The Key Phrase In the "Douglas Amendment" Was Carefully Drafted	10
D. The "Douglas Amendment" Was Not Intended to Affect Exempt Transactions	11
E. There Is No Conflict of Decisions	12
F. Uniform Administrative Construction of the Statute	14
G. No Justification For "Piercing the Corporate Veil"	17
II. The Standing Issue:	
A. The Lower Court Decisions That Petitioner Lacked Standing Are Clearly Correct	18
1. The Petitioner Is Not an Aggrieved Party	18
2. The Bank Holding Company Act May Not Be Enforced In Civil Litigation	20
B. The Decision Below Is an Alternative Decision	21
C. The Decision Below Is Not In Conflict With the Decision of Any Other Court or Federal Agency	21
Conclusion	22

APPENDICES

Page

Appendix A, Extracts from Bills Dealing with Bank Holding Companies—Sections Containing the Phrase "other than a bank" A1

Appendix B, Extracts from Bills Dealing with Bank Holding Companies—Sections Containing the Phrase "no application shall be approved under this section" A2

Appendix C, Extract from First Annual Report of the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956, May 7, 1958 ..... A5

Appendix D, Extract from the 1960 Annual Report to Congress of the Board of Governors of the Federal Reserve System A10

Appendix E, Letter from Chairman Wm. McC. Martin, Jr., of the Board of Governors of the Federal Reserve System to Congressman Wright Patman A11

CITATIONS

Cases: **Page**

Billings v. Truesdell, 321 U.S. 542, 552-553 (1944) 16

Casey v. Galli, 94 U.S. (4 Otto) 673 (1876) 18

First National Bank in Billings, et al., v. First Bank Stock Corporation, et al., 197 F. Supp. 417, 422 (D. Mont. 1961) 12

First National Bank in Billings, et al., v. First Bank Stock Corporation, et al., 306 F.2d 937 (9th Cir. 1962) 13, 17

Riss & Company v. Association of American Railroads, D.C., 178 F. Supp. 438 (1959) 20

State of South Dakota v. The National Bank of South Dakota, Sioux Falls, et al., 219 F. Supp. 842, 852-53 (D. So. Dak. 1963) 13

State of South Dakota v. The National Bank of South Dakota, Sioux Falls, et al., 235 F.2d 444 (8th Cir. 1964) 13

United States v. Citizens Loan Co., 316 U.S. 209, 214 (1942) 16

United States v. First National Bank & Trust Company of Lexington, 376 U.S. 665 (1964) 5

United States v. Jackson, 280 U.S. 183, 193 (1930) 16

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 5

Whitney National Bank v. Bank of New Orleans, 323 F. 2d 290 (D.C. Cir. 1963), *cert. granted* 32 U.S.L. Week 3325 (1964) 17, 18

Statutes: **Page**

Bank Holding Company Act of 1956:

12 U.S.C. §§ 1841-1848 ..... 3, 6

12 U.S.C. §1842(a) 9, 12, 13, 15, 16

12 U.S.C. §1842(a)(3) 6, 7, 14, 15, 16

12 U.S.C. §1842(d) 9, 10, 12, 13, 15, 16

12 U.S.C. §1847 20

National Bank Act:

12 U.S.C. §36(c) 4

Bank Merger Act of 1960 (Amendment to Federal Deposit Insurance Act):

Section 18(c) 14

12 U.S.C. §1828(c) 3, 14, 15

74 Stat. 129-130 (1960) 14

Miscellaneous:

2 U.S. Code Cong. & Admin. News (1956), pp. 2482, 2493 11

102 Cong. Rec. 6859 (1956) 11

Federal Reserve Bulletin, July, 1958, pp. 776-796 14

Federal Rules of Civil Procedure 56(c) 4

Hearings Before the House Committee on Banking and Currency on H.R. 6504, 82d Cong., 2d Sess. (June 24, 1952), p. 24 8

Senate Report 1095, 84th Cong., 1st Sess. 11

In The

Supreme Court of the United States

October Term, 1964

No. 658

STATE OF SOUTH DAKOTA,

Petitioner,

vs.

THE NATIONAL BANK OF SOUTH DAKOTA, SIOUX FALLS, and FIRST BANK STOCK CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court is reported at 219 F. Supp. 842. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 335 F.2d 444, and is reprinted as Appendix A of the Petition.

JURISDICTION

Respondents agree with the statement in the Petition that the jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* §1254(1). Respondents do not agree that this case warrants review by this Court under Rule 19 of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Does a transaction in which one bank acquired the assets of other banks violate the Bank Holding Company Act of 1956 in view of the well-defined exception created by the words "other than a bank" in 12 *U.S.C.* §1842(a)(3)?

2. Does the "Douglas Amendment," 12 *U.S.C.* §1842(d), apply to transactions for which the prior approval of the Board of Governors of the Federal Reserve System is not required under 12 *U.S.C.* §1842(a)?

3. Does a State which has suffered no injury or damage, and is not aggrieved, have standing to maintain a civil action to enforce a Federal statute which does not provide for civil enforcement?

STATUTES INVOLVED

The statutes involved are 12 *U.S.C.* §1842(a), 12 *U.S.C.* §1842(d), and 12 *U.S.C.* §1847.

STATEMENT OF THE CASE

This is an action brought by the State of South Dakota against The National Bank of South Dakota, Sioux Falls, and First Bank Stock Corporation. Declaratory and injunctive relief, including divestiture, are sought (R. 7-8). United States District Court for the District of South Dakota entered judgment in favor of defendants (R. 133). The United States Court of Appeals for the Eighth Circuit affirmed. 335 F.2d 444.

The National Bank of South Dakota, Sioux Falls, is a national bank association organized under the laws of the United States (R. 1). First Bank Stock Corporation is a Delaware corporation with its principal place of business at Minneapolis, Minnesota (R. 1-2). First Bank Stock Corporation is a bank holding company registered as such under the

Bank Holding Company Act of 1956, 12 *U.S.C.* §§1841-1848 (R. 2). At all times material, First Bank Stock Corporation has owned not less than ninety percent of the voting shares of stock of The National Bank of South Dakota, Sioux Falls (R. 42-43).

This litigation arises out of a transaction which took effect on December 6, 1962. Involved in that transaction were three state banks:

> Farmers and Merchants Bank, Platte, South Dakota;
> Farmers and Merchants Bank, Presho, South Dakota;
> Farmers and Merchants Bank, Wessington Springs, South Dakota.

Prior to December 6, 1962, Mr. N. J. Thomson and members of his family held controlling stock interests in each of these banks. For convenience these banks will be referred to as the "Thomson Banks" (R. 112-113).

The transaction took place pursuant to an "Agreement of Merger and Plan of Reorganization" which was entered into under date of October 9, 1962, by the three Thomson Banks, The National Bank of South Dakota, Sioux Falls, and First Bank Stock Corporation (R. 8-41). Pursuant to the Agreement, and effective on December 6, 1962, the Thomson Banks merged with The National Bank of South Dakota, Sioux Falls, under the charter of the latter bank, and the resulting bank acquired all of the assets and liabilities of the Thomson Banks. Effective on the same date, The National Bank of South Dakota, Sioux Falls, established branches at Platte, Corsica, Presho and Wessington Springs, South Dakota, the municipalities in which the Thomson Banks had maintained banking offices (R. 3, 113).

The merger transaction was consummated with the prior written consent of the Comptroller of the Currency as required by the Bank Merger Act of 1960, 12 *U.S.C.* §1828(c)

(R. 44, 56). The branches of The National Bank of South Dakota, Sioux Falls, at Platte, Corsica, Presho and Wessington Springs, South Dakota, were established with the approval of the Comptroller of the Currency under 12 *U.S.C.* §36(c) (R. 44, 56-59).

The merger transaction was one in which The National Bank of South Dakota, Sioux Falls, acquired the *assets* of the Thomson Banks. Plaintiff admitted that this was an acquisition of assets in its complaint.[1] In reliance upon the allegations of the complaint,[2] the District Court held that this transaction was an acquisition of assets (R. 112).

Plaintiff sought to change its position before the Court of Appeals and contends that the transaction was an acquisition of stock rather than an acquisition of assets. In response to this contention, the Court of Appeals stated:

> "Plaintiff cannot thus shift its position upon appeal and assert an issue not raised in the trial court. In any event the record clearly shows that National Bank acquired the assets of the Thomson Banks, not their stock." 335 F.2d at 449; Petitioner's Appendix, page A 11.

This merger has not been attacked under the anti-trust laws. It had no adverse affect upon competition. The National Bank of South Dakota, Sioux Falls, ranks third among the six banks in Sioux Falls (R. 45-55). The three Thomson Banks serve entirely separate agricultural trade areas in

---

[1]See paragraphs *Fourth*, *Fifth*, *Sixth*, *Seventh* and *Ninth* of Count II of the complaint (R. 6-7).

[2]Plaintiff and defendants moved for summary judgment (R. 68-69, 41-42). Under Rule 56(c) of the Federal Rules of Civil Procedure, the District Court is directed to consider "the *pleadings*, depositions and admissions on file together with the affidavits, if any, * * *" in deciding a motion for summary judgment.

central South Dakota,[3] ranging in population from 479 persons to 1,488 persons (R. 43). The factors which warranted review by this Court in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), and *United States v. First National Bank & Trust Company of Lexington*, 376 U.S. 665 (1964), are not present in this case.

SUMMARY OF ARGUMENT

This case does not warrant review by this Court.

The substantive law issue involves a clearly defined exception in the Bank Holding Company Act of 1956 which permits a subsidiary bank to acquire the assets of another bank without prior approval of the Board of Governors of the Federal Reserve System. This exception was deliberately created as part of the evident Congressional plan.

The so-called "Douglas Amendment" to the Bank Holding Company Act does not apply to this type of transaction. The Douglas Amendment applies only to those transactions requiring approval of the Board of Governors. Since this transaction did not require Board approval, the Douglas Amendment does not apply.

The four courts which have considered the effect of the Douglas Amendment have reached the same result. There is no conflict of judicial authority which needs resolution by this Court. The Board of Governors of the Federal Reserve System, the agency charged with administration of the Bank

---

[3]Platte, South Dakota, is approximately 120 miles west of Sioux Falls, 100 miles southwest of Huron (the location of the nearest pre-existing branch of the Sioux Falls Bank), approximately 75 miles south of Wessington Springs, and approximately 90 miles east of Presho.

Presho is approximately 200 miles west of Sioux Falls, approximately 150 miles southwest of Huron, and approximately 100 miles west of Wessington Springs.

Wessington Springs is approximately 120 miles northwest of Sioux Falls and approximately 41 miles southwest of Huron.

Holding Company Act, has consistently interpreted that statute as not restricting bank mergers of the type under consideration here.

The decisions of the lower courts to the effect that Petitioner lacks standing to sue are clearly correct. Petitioner is not an aggrieved party; it has not suffered any injury or damage. The Bank Holding Company Act contains no provision for civil enforcement.

The lower courts decided the instant case on its merits adversely to Petitioner. The holding that Petitioner lacks standing to sue is purely an alternative basis for decision. The lower court holding on the standing issue is not in conflict with the decision of any other court or federal agency.

ARGUMENT

I.

THE BANK HOLDING COMPANY ACT ISSUE

The substantive law issue in the instant case is extremely narrow, involving clear and unambiguous provisions of the Bank Holding Company Act of 1956. 12 *U.S.C.* §§1841-1848. No amount of strained argument can convert the issue into one warranting review by this Court of certiorari.

On December 6, 1962, The National Bank of South Dakota, Sioux Falls, acquired all of the assets of the three Thomson Banks. This transaction—far from being illegal as Petitioner contends—falls within a well-recognized exception in the Bank Holding Company Act of 1956.

The relevant prohibitory provisions of the statute are found in §1842(a)(3), which read as follows:

> "It shall be unlawful except with the prior approval of the Board
>
> (3) for any bank holding company or subsidiary thereof, *other than a bank*, to acquire all or substantially all of the assets of a bank;" (Italics supplied.)

The statute prohibits acquisitions of assets by a bank holding company and by *non-bank* subsidiaries. However, the statute permits the acquisition of assets by a subsidiary of a bank holding company if that subsidiary is a bank.

As noted, the assets of the Thomson Banks were acquired by The National Bank of South Dakota, Sioux Falls. The National Bank of South Dakota, Sioux Falls, is a subsidiary of a bank holding company. It is, however, a *bank subsidiary.* Therefore, when that bank acquired the assets of the Thomson Banks there was no violation of the Bank Holding Company Act of 1956.

A. The Phrase "Other Than a Bank" Is a Deliberately Created Exception.

The phrase "other than a bank" in §1842(a)(3) constitutes a deliberate, and carefully created, exception in the Bank Holding Company Act of 1956. The statute prohibits a bank holding company, or a non-banking subsidiary thereof, from acquiring the assets of a bank. However, the phrase "other than a bank" limits the prohibitory language, so that it does not extend to instances in which a *bank* acquires the assets of another bank, even though the acquiring bank is a subsidiary of a bank holding company. It is clear from the legislative history of the statute that this exception was deliberately created. Five major bills considered in Congress between 1952 and 1956 used the phrase "other than a bank" to limit the prohibition against the acquisition of assets.[4] The limiting phrase "other than a bank" was no legislative oversight.

Congress had good reason for not legislating against transactions in which a bank, which is a subsidiary of a bank

---

[4]The relevant portions of these bills are set forth in Appendix A attached to this brief.

holding company, acquires the assets of another bank. In 1952, Governor J. L. Robertson appeared for the Board of Governors of the Federal Reserve System before the House Committee on Banking and Currency. In his testimony, Governor Robertson stated the views of the Board of Governors on asset acquisitions by banks as follows:

> "It will be observed that we do not propose that the legislation cover acquisitions of bank assets, as distinguished from bank stocks. Our reasons for this should be explained. If a bank acquires the assets of another bank, ordinarily it is for the purpose of converting such other bank into a branch of the acquiring bank. In such cases, of course, the consent of one of the bank supervisory agencies generally would be required under existing law. In those few cases in which the acquisition of assets would not result in the establishment of a branch but would have the effect of eliminating the bank whose assets are acquired, the matter should be covered, not by bank holding company legislation, but by provisions of Federal law already on the books which make acquisitions of bank assets by banks subject to approval by the appropriate supervisory agency, that is, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the Board of Governors. Those provisions are contained in the Federal Deposit Insurance Act which was enacted in 1950.
>
> "We would suggest, therefore, that any further restrictions on the acquisition of bank assets, as distinguished from bank stocks, should be made in the form of amendments to section 18(c) of the Federal Deposit Insurance Act rather than in legislation directed at the expansion of bank holding companies."

Hearings before the House Committee on Banking and Currency on H.R. 6504, 82d Cong., 2d Sess. (June 24, 1952), p. 24.

The Board of Governors opposed duplication in regulation. For this reason, the Board of Governors favored provisions which would exempt asset acquisitions by banks from regula-

tion under the Bank Holding Company Act. These views prevailed. Beyond question, by deliberate legislative design, the Bank Holding Company Act does not prohibit transactions in which one bank acquires the assets of another, even where the acquiring bank is a subsidiary of a bank holding company.

B. The "Douglas Amendment" Does Not Apply.

Petitioner attempts to invoke the so-called "Douglas Amendment" to the Bank Holding Company Act, 12 *U.S.C.* §1842(d). Section 1842(d) provides in part as follows:

> "Notwithstanding any other provision of this section, *no application shall be approved under this section* which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acquisition of such shares or assets of a State Bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." (Italics supplied.)

The key words in §1842(d) are "no application shall be approved under this section." In the statutory scheme, the transactions requiring applications for prior approval of the Board of Governors of the Federal Reserve System are enumerated in §1842(a). Section 1842(d) is a limitation on the power of the Board of Governors to approve an out-of-state acquisition, but only if the Board's approval is required under §1842(a) in the first place. Section 1842(d) applies only to those transactions needing prior approval of the Board under §1842(a).

By virtue of the "other than a bank" exception in §1842(a), no application to the Board of Governors was required in the

instant case. Clearly, therefore, §1842(d) — the so-called "Douglas Amendment"—has no application to the instant case.

C. The Key Phrase in the "Douglas Amendment" Was Carefully Drafted.

The legislative history of the Bank Holding Company Act of 1956 shows that the "Douglas Amendment" had many antecedents. At least five major bills considered by Congress contained provisions to restrict out-of-state expansion by bank holding companies. The text of these provisions is set forth in Appendix B.

Upon analysis of these provisions, the statutory scheme becomes apparent. In each provision, the key phrase "no application shall be approved under this section" stands out.

Neither the Douglas Amendment, nor any of its legislative antecedents, was intended to possess any independent prohibitory power. The prohibitory power is lodged in other provisions requiring prior approval of the Board of Governors. The purposes of the Douglas Amendment, and its antecedents, were accomplished by restricting the power of the Board of Governors to approve out-of-state transactions.

The key phrase "no application shall be approved under this section" was inserted in the Douglas Amendment deliberately. The presence of the same key phrase in similar provisions of prior bills makes that plain. Full force and effect should be given to the evident statutory plan.

D. The "Douglas Amendment" Was Not Intended to Affect Exempt Transactions.

Petitioner seeks to convey the impression that the Douglas Amendment was intended to prohibit all out-of-state expansion by bank holding companies and their subsidiaries. Clearly, this is not true. Congress recognized that the Bank Holding Company Act of 1956 was limited legislation. This statute does not purport to be a complete system of regulation. *Senate Report 1095*, 84th Cong., 1st Sess., stated:

> "No pretense is made that this bill will regulate all forms of centralized control of financial institutions." 2 *U. S. Code Cong. & Admin. News* (1956), pp. 2482, 2493.

Even Senator Douglas, the sponsor of the Amendment, recognized that there were exemptions in the bill. On the floor of the Senate, Senator Douglas stated:[5]

> "Mr. Douglas: No; it is not, because I think, on the whole, the bill is a step forward. I am not too happy about these exemptions. They came about in the play of stresses and strains of banking and political life. I think I voted against most of them in committee. But if my amendment is approved, I think, on the whole, the bill will be a big step forward. If it is not approved, it will be a little step forward." 102 Cong. Rec. 6859 (1956).

The prohibitory portions of the statute were carefully drafted in committee following lengthy hearings. Through the use of precise language, Congress chose the transactions to be regulated under the statute.

The Douglas Amendment was superimposed on the statutory plan which emerged from committee. In adopting the Amendment, Congress did not intend to re-write the permissive and restrictive provisions of the statute, which had been

---

[5]This statement by Senator Douglas was part of a colloquy with Senator Kuchel. That colloquy, in its entirety, is set forth in an Appendix to the Petition for Writ of Certiorari in this case, at pages A26 to A28.

carefully developed after lengthy hearings and years of study. All that was intended was to insert a special provision limiting the power of the Board of Governors to approve out-of-state acquisitions. It was never intended to apply to transactions which did not require Board approval.

E. There Is No Conflict of Decisions.

The meaning and effect of the Douglas Amendment has been considered by four courts. All four courts agree that the Douglas Amendment does not enlarge upon the restrictions of the statute, but merely establishes a special rule to be followed by the Board of Governors in considering applications for out-of-state acquisitions.

In *First National Bank in Billings, et al., v. First Bank Stock Corporation, et al.*, 197 F. Supp. 417, 422 (D. Mont. 1961), the Court said:

> "Counsel for plaintiffs have devoted considerable time and effort to an argument that plaintiffs are proceeding under §1842(d) rather than §1842(a). Defendants contend that subdivision (d) is nothing more than a legislative direction to the Board and does not in any way enlarge on the provisions of (a). I agree with this interpretation and hold that these subdivisions, being part of the one general statute, must be construed together. [Citations omitted.]
>
> "A thorough analysis of subdivision (d), §1842, reveals that its only purpose is to make a special rule with reference to out of state holding companies acquiring voting shares in, or assets of, an additional state bank. Before such shares or assets could be legally acquired, after the effective date of the Act, the statutes of the state in which such bank was located would have to authorize such acquisition by direct language and not by implication. This subdivision does not enlarge on the prohibitions of subdivision (a) other than mentioned. Before the Board would look to (d) it would first have to find that approval was necessary under the other provisions of the Act. * * *"

That decision was affirmed by the United States Court of Appeals for the Ninth Circuit. *First National Bank in Billings, et al., v. First Bank Stock Corporation, et al.*, 306 F.2d 937 (9th Cir. 1962).

In the instant case, the District Court held that the Douglas Amendment, §1842(d), applied only in those transactions for which approval of the Board of Governors is required under §1842(a). *State of South Dakota v. The National Bank of South Dakota, Sioux Falls, et al.*, 219 F. Supp. 842, 852-53 (D. So. Dak. 1963).

That decision was affirmed by the United States Court of Appeals for the Eighth Circuit. *State of South Dakota v. The National Bank of South Dakota, Sioux Falls, et al.*, 235 F.2d 444 (8th Cir. 1964). In that connection, the Court of Appeals stated:

> "The remaining subsections of §1842, including subsection (d) largely relied upon by the plaintiff, set forth the procedures to be followed where an application to the Board of Governors is required. The words of subsection (d) reading: 'no application shall be approved under this section' manifest a Congressional intention that the section only applies to instances where approval of the Board of Governors is required. As Judge Mickelson points out, such interpretation is substantiated by the legislative history and the administrative interpretation of such provisions by the Board of Governors." 335 F.2d at 449.

Thus, all four courts which have considered the effect of the Douglas Amendment have reached the same result. There is no conflict of judicial authority which needs resolution by this Court.

F. Uniform Administrative Construction of the Statute.

The primary responsibility for the administration of the Bank Holding Company Act of 1956 is vested in the Board of Governors of the Federal Reserve System. The Board of Governors has consistently interpreted the Bank Holding Company Act as not prohibiting bank mergers of the type under consideration here, even where a subsidiary bank of an out-of-state bank holding company is concerned.

A clear statement of the construction placed on the Bank Holding Company Act by the Board of Covernors is found in the Board's first annual report to Congress, filed May 7, 1958. *Federal Reserve Bulletin*, July, 1958, pp. 776-796. In that report, the Board recommended that a number of amendments be made in the Bank Holding Company Act. Number 15 of the amendments recommended by the Board discussed the significance of the phrase "other than a bank."[6] The Board of Governors recommended that the words "other than a bank" be deleted from §1842(a)(3).[7]

---

[6]The full text of the Board's recommendation Number 15 is set forth in Appendix C.

[7]There is no inconsistency between this recommendation made in 1958 and the earlier position taken by the Board of Governors prior to the enactment of the Bank Holding Company Act of 1956. Prior to enactment of the Bank Holding Company Act, the Board of Governors suggested that the statute not regulate transactions in which a subsidiary bank acquired the assets of another bank. Such transactions normally involve the establishment of branches which require approval of regulatory agencies. The Board recommended that any further regulation of bank mergers be accomplished through an amendment to §18(c) of the Federal Deposit Insurance Act. See statement of Governor Robertson, *supra*, p. 8.

The Bank Merger Act of 1960 took the form of an amendment to §18(c) of the Federal Deposit Insurance Act. 12 *U.S.C.* §1828(c); 74 *Stat.* 129-130 (1960). During the interim between the enactment of the Bank Holding Company Act in 1956 and the enactment of the Bank Merger Act of 1960, the Board of Governors filed its first annual report in 1958. Inasmuch as no bank merger legislation had yet been enacted, the Board of Governors recommended that the words "other than a bank" be deleted from §1842(a)(3).

The Board of Governors set forth the reasons for its 1958 recommendation that this phrase be deleted. It pointed out that the statute prohibited expansion by a bank holding company through the acquisition of stock of an independent bank. It noted, however, that by virtue of the phrase "other than a bank," the statute did not apply to transactions in which a holding company subsidiary bank acquired the assets of an independent bank. The Board of Governors further noted that §1842(d) did not affect the latter type of transaction because Board approval was not required under §1842(a).

Notwithstanding this 1958 recommendation of the Board of Governors, Congress did not delete the phrase "other than a bank" in §1842(a)(3). Instead, Congress enacted the Bank Merger Act of 1960, 12 *U.S.C.* §1828(c).

The passage of the Bank Merger Act of 1960 caused the Board of Governors to withdraw its 1958 recommendation. In its 1960 annual report to Congress, the Board stated that the passage of the Bank Merger Act of 1960 made the amendment to the Bank Holding Company Act unnecessary. The Board stated that to regulate mergers under the Bank Holding Company Act, as well as under the Bank Merger Act, would produce an unjustified duplication of supervision.[8]

That the Board of Governors has adhered to these views is clear from the letter of Chairman Martin to Congressman Wright Patman dated April 17, 1962, which is set forth in Appendix E. The interpretation which the Board of Governors has placed on the statute also appears from the letter dated April 30, 1963, from Merritt Sherman, Secretary, to Mr. Joseph H. Colman, Chairman of the Board of First Bank Stock Corporation (R. 66-68).

The following is the most significant paragraph of that letter:

---

[8]The statement of the Board of Governors in this respect is set forth in Appendix D.

> "Since shortly after passage of the Act in 1956 the Board has consistently construed section 3(d) [§1842 (d)] to apply only to cases in which Board approval is required under section 3(a) [§1842(a)]. The Board has also taken the position in various cases that section 3(a)(3) [§1842(a)(3)] does not necessitate Board approval of a holding company bank's acquisition of the assets of another bank, although Board consent would now be required in such a case under the Bank Merger Act of 1960 if the acquiring bank were a State member bank." (Underlining in original.) (R. 67.)

The Board of Governors has been consistent in its interpretation of the statute. The phrase "other than a bank" in §1842(a)(3) has been given full effect by the Board of Governors. Board approval is not required in those instances when one bank acquires the assets of other banks, even when the acquiring bank is a subsidiary of the bank holding company.

The Board of Governors has fully recognized the effect of the key phrase in the Douglas Amendment—"no application shall be approved under this section." The Douglas Amendment applies only to those transactions for which Board approval is required under §1842(a).

The Board of Governors of the Federal Reserve System has the primary responsibility for the administration of the Bank Holding Company Act of 1956. Under the decisions of this Court, the interpretation placed on the statute by the Board of Governors is entitled to substantial weight. *United States v. Jackson*, 280 U.S. 183, 193 (1930); *United States v. Citizens Loan Co.*, 316 U.S. 209, 214 (1942); *Billings v. Truesdell*, 321 U.S. 542, 552-553 (1944).

G. No Justification for "Piercing the Corporate Veil."

Petitioner asks this Court to "pierce the corporate veil" and hold that First Bank Stock Corporation, rather than its subsidiary bank, acquired the assets of the three Thomson Banks. Both the trial court, and the Court of Appeals, rejected these contentions. 219 F. Supp. 842, 853-854, 335 F.2d 444, 449.

In support of its claims, Petitioner cites the case of *Whitney National Bank v. Bank of New Orleans*, 323 F.2d 290 (D.C. Cir. 1963), *cert. granted* 32 U.S.L. Week 3325 (1964). That case is clearly distinguishable from the case at bar. In the *Whitney* case, a bank holding company arrangement was established for the sole and deliberate purpose of evading a prohibition against the establishment of branch banks. The Court of Appeals for the District of Columbia was prepared to "pierce the corporate veil" to find that what was ostensibly a bank holding company arrangement was actually branch banking.

The Court distinguished the situation in the *Whitney* case from that presented in *First National Bank in Billings v. First Bank Stock Corporation*, 306 F.2d 937 (9th Cir. 1962). The Court of Appeals for the District of Columbia recognized that First Bank Stock Corporation is very different from the holding company involved in the *Whitney* case, stating:

> "The Billings case is far from being factually 'on all fours' with the present case. There the bank holding company [i.e., First Bank Stock Corporation] was organized in 1929, and had been operating in that capacity for 30 years. It possessed stock in 87 banks with 94 offices. Thus, it was not created or organized by a bank, as Whitney Holding was, solely for the purpose of opening a branch office of that bank. It was the traditionally recognized bank holding company which, with its own capital, invests in or buys the stock of banks. It was not the type of holding company here involved, whose only

capital was the money siphoned through it by Whitney-New Orleans to open Whitney-Jefferson in a prohibited location." 323 F.2d at 303.

The *Whitney* case is *not* authority for piercing the corporate veil in the instant case. There is no resemblance between First Bank Stock Corporation and the holding company arrangement in which the "corporate veil" should be pierced.

II.

THE STANDING ISSUE

A. The Lower Court Decisions That Petitioner Lacked Standing Are Clearly Correct.

1. The Petitioner Is Not an Aggrieved Party.

In its Petition, Petitioner complains, in rather colorful language, that it has been the victim of an "invasion" by a "foreign Bank Holding Company." But certiorari is not granted on colorful language alone; and an examination of the facts shows that although Petitioner may be unhappy, it has not suffered any injury or damage.

It is true that three banks chartered by Petitioner—the three Thomson banks—have become branches of a national bank. But it is clear that Petitioner has not been wronged by this action and cannot complain of it. This Court held long ago that the consent of a State is not prerequisite to the conversion of a state bank into a national bank. *Casey v. Galli*, 94 U.S. (IV Otto) 673 (1876).

Petitioner has furnished no proof of injury. While the complaint contains naked and conclusionary allegations of "irreparable injury," no proof was submitted in support of such claims. The State Superintendent of Banks, in his affidavit in support of Petitioner's motion for summary judg-

ment, presents no facts to substantiate any claim of damage or injury (R. 69-71).

The trial court found that Petitioner has not been wronged by the actions of the respondents.

> "The operation of the Thomson banks as branches by the National Bank does not appear to invade any established property rights of the State or of any state bank. The State has not demonstrated that any individual is being adversely affected by the operation of the branch banks." 219 F. Supp. 842, 847.

This finding was confirmed and quoted by the Court of Appeals. We submit that it is determinative of the question of Petitioner's standing.

It is basic to our system of law that in order to have standing to maintain an action, one must have suffered some injury or damage recognized by the law. Petitioner has failed utterly to show that either it or any of its citizens, corporate or natural, have suffered any legal wrong at the hands of the Respondents.

The Petition also recites that the State is threatened with damage; that its entire banking system is in danger of being "engulfed." We submit that this suggestion is rather fanciful. Petitioner has offered no evidence to support its claim, and, we submit, it cannot. Once again Petitioner attempts to build an issue on provocative words; but, as we have noted, certiorari is not granted on colorful language alone. No amount of argument can convert a bare and unsubstantiated allegation into an issue warranting certiorari.

2. The Bank Holding Company Act May Not Be Enforced in Civil Litigation.

The Bank Holding Company Act contains no provision for civil enforcement. Congress provided for criminal enforcement alone, 12 *U.S.C.* §1847, and an examination of the legislative history of the Act reveals clearly that Congress intended the provisions for criminal enforcement to be exclusive.

Petitioner asked the trial court and the Court of Appeals to grant a new remedy, to permit civil enforcement, and each court properly refused, stating:

> " 'Where Congress has not provided for civil suits to enforce federal legislation, it is not for the courts to do so. See *Riss & Company v. Association of American Railroads*, D.C., 178 F. Supp. 438 (1959)." 219 F. Supp. 842, 848." 335 F.2d 444, 447 (8th Cir. 1964).

The Petitioner's insistence that someone other than the Federal Government should have the right to enforce the Bank Holding Company Act is irrelevant. The issue is not whether Congress should have authorized civil enforcement, but whether it did. And, as both courts below held, Congress clearly intended that the provisions for criminal enforcement be exclusive. Courts may agree or disagree with the wisdom of Congressional intent; but they cannot rewrite the statute.

Moreover, the Petitioner's urgent claim that it is without remedy is unfounded. It is true that Congress has chosen not to give Petitioner a *judicial* remedy; but Petitioner has a *legislative* remedy. Petitioner, if it truly believes that its banking system is in danger of being "engulfed," may seek the assistance of Congress; and if the Petitioner's fears have substance, Congress may provide the remedy.

The Bank Holding Company Act is clear and unambiguous in its provision for enforcement by criminal procedures only. It is obvious that Petitioner wishes to change the Act; but amendments are made by Congress, not by the courts. Of

course, even if civil enforcement were permitted, Petitioner would not be a proper plaintiff since Petitioner is not aggrieved.

B. The Decision Below Is an Alternative Decision.

Both the trial court and the Court of Appeals decided that the State lacked standing (a) because the Bank Holding Company Act cannot be enforced in civil litigation, and (b) because the State had not been aggrieved. Moreover, each court also decided the case on its merits. We submit that a case coming to the Supreme Court in this posture, with these many alternative grounds for decision, is not a proper case for granting certiorari.

C. The Decision Below Is Not in Conflict with the Decision of Any Other Court or Federal Agency.

No other Federal Courts have decided the question of civil enforcement of the Bank Holding Company Act. The Board of Governors of the Federal Reserve System, charged with the responsibility for administering the Act, has repeatedly expressed the view that the Act may be enforced by criminal prosecution alone. There is no sound basis for overturning this long standing administrative interpretation.

CONCLUSION

The issues presented in this case are extremely narrow. The exception in the Bank Holding Company Act into which this transaction falls is well-recognized, clear and unambiguous. The courts which have considered the effect of the Douglas Amendment are in agreement. The lower court decisions in this case are in complete agreement with the interpretation which the Board of Governors of the Federal Reserve System has consistently placed on that statute since its enactment.

The decision of the Court of Appeals on the standing issue is purely an alternative basis for decision. As such, it does not warrant review by this Court. Furthermore, Petitioner has suffered no injury or wrong, is not an aggrieved party, and lacks standing to sue. In any event, Congress did not intend that the Bank Holding Company Act be enforced by civil litigation.

The decision of the Court of Appeals is clearly correct. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MELVIN T. WOODS
310 South First Avenue
Sioux Falls, South Dakota

CURTIS L. ROY
2400 First National Bank Building
Minneapolis, Minnesota 55402
Attorneys for Respondents

Of Counsel:
DORSEY, OWEN, MARQUART, WINDHORST & WEST
ROBERT O. FLOTTEN
ROBERT A. JENSEN
2400 First National Bank Building
Minneapolis, Minnesota 55402